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Supreme Court, U.S.
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No. 66

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

JULIUS SILVERMAN, MEYER SCHWARTZ, and ROBERT L. MARTIN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR PETITIONERS

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## BRIEF FOR PETITIONERS

### OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 838 (R. 29). The opinion of the Court of Appeals is reported at 275 F. 2d 173 (R. 261).

### JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1960 (R. 272), and a petition for rehearing in banc was denied on March 8, 1960 (R. 278). The petition for a writ of certiorari was filed on April 6, 1960, and was granted on May 31, 1960. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

D. C. Code § 22-1502 (1951 ed.), 52 Stat. 198, as amended, 67 Stat. 95:

> "If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof."

D. C. Code § 22-1504 (1951 ed.), 31 Stat. 1331:

> "Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years."

D. C. Code § 22-1505 (1951 ed.), 31 Stat. 1331, as amended, 67 Stat. 95:

> "(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia used or to be used

in violating the provisions of section 22-1501 or 22-1504, shall be deemed 'gambling premises' for the purpose of this section.

"(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * *

"(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both."

U. S. Code § 47-605, c. 652, 48 Stat. 1103:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall re-

ceive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Rule 41, Federal Rules of Criminal Procedure:

"(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"(b) **Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

"(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

. . .

## QUESTION PRESENTED

Whether evidence obtained by federal officers through the use of a spike microphone inserted into a party wall, which enabled them to overhear everything said in the contiguous private dwelling house occupied by petitioners, is admissible against petitioners in a federal court.

## STATEMENT

A four-count indictment was returned against petitioners in the United States District Court for the District of Columbia on July 30, 1958 (R. 256-257). They were charged with operating a gambling enterprise

from April 21 to April 30, 1958, in violation of D. C. Code §§ 22-1502, 22-1504, 22-1505, and 26 U.S.C. § 7262.

Petitioners promptly moved for the return and suppression of all evidence obtained during a search of their premises at 408 21st Street, N. W., in the District of Columbia (R. 257-258). They alleged that the federal officers who conducted this search were armed with an invalid search warrant, because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Communications Act. This motion also sought suppression of all evidence as to conversations within their premises which had been overheard by federal officers.

Petitioners' motion came on for hearing before Judge Alexander Holtzoff (R. 39). It was stipulated by counsel for the government that federal officers secured permission from the owner of 410 21st Street, a vacant house separated from petitioners' premises by a party wall, to use the vacant house for purposes of observation (R. 40). It was further stipulated that the officers slipped an electronic listening device under the baseboard of a room in the vacant house, enabling them to overhear everything said in petitioners' premises (R. 40). Government counsel stipulated that the device had a spike twelve inches long, which was inserted into the party wall six or seven inches but which did not go completely through the wall (R. 43). It was not disputed that the officers subsequently secured a search warrant upon the basis of what they had overheard with this instrument.

Judge Holtzoff denied petitioners' motion on the ground that the protection of the Fourth Amendment is

limited to physical searches and seizures of physical objects, citing *Olmstead* v. *United States*, 277 U.S. 438, and *Goldman* v. *United States*, 316 U.S. 129 (R. 21). The court went on to hold that there was no violation of § 605 of the Communications Act and that there was no "trespass" sufficient to distinguish the *Goldman* decision, despite the fact that the federal agents admittedly penetrated the wall with the spike of the microphone (R. 23-24).

Subsequently the government obtained a five-count superseding indictment because of a technical defect in its original indictment (R. 7-8).[1] Petitioners renewed their motion to suppress, which was denied without argument by Judge Luther Youngdahl upon the authority of the prior ruling (R. 9-10, 19).

The case came on for trial before Judge Joseph R. Jackson. Objections to testimony given by the officers who had overheard petitioners' conversations with the electronic eavesdropping device were overruled upon the authority of the pretrial rulings (R. 53).

Two special agents of the Internal Revenue Service and a member of the District of Columbia Metropolitan Police Department testified in detail concerning their electronic surveillance of petitioners' premises. Prior to April 21, 1958, they entered the vacant house to determine the feasibility of using an electronic listening device (R. 93). They made tests with a so-called spike microphone which was inserted under the baseboard of the vacant house several feet from the front

[1] The United States Attorney obtained a superseding indictment because the word "knowingly" had been omitted from the third count of the original indictment (R. 256). The superseding indictment added a count framed under D. C. Code § 22-1508.

wall (R. 99-100). This device consisted of a microphone with a spike eleven and three-fourths inches long attached to it, together with an amplifier, a power pack, and an earphone (R. 101-103). It was inserted into the party wall approximately halfway, at which point it met with resistance, and it was capable of transmitting conversations which took place anywhere in petitioners' house (R. 84, 98, 104).

The officers knew that petitioners' heating duct was located inside the party wall at the point where they inserted the spike (R. 144-148). They considered the possibility that it was making contact with the duct. They knew that for maximum effectiveness this type of microphone must come into contact with something which acts as a sounding board (R. 156-158).

Formal surveillance began on April 21, and continued on April 22, 23, 24, 25, and 29. The officers inserted the spike microphone into the party wall on April 22, 23, and 24. They testified that they overheard petitioners quote odds and accept bets on baseball games and prize fights over the telephone. The officers quoted many of petitioners' conversations before the jury (R. 62-68, 85-90, 123-125).

The officers secured arrest and search warrants on April 30. These warrants were based upon an affidavit which was in turn based upon the conversations overheard with the spike microphone (R. 12-18). The warrants were executed on the same date, and the officers testified that they found records of odds and bets on petitioners' premises. These were subsequently introduced into evidence (R. 11, 128-131). The officers testified that while they were searching the premises

they answered telephone calls from persons who wanted to place bets (R. 137-139, 167-168, 181-183).

Petitioners introduced the testimony of three witnesses who had participated in various experiments on their premises. These witnesses testified that there was a space in the party wall directly behind petitioners' heating duct which was not filled in with bricks (R. 209-211). There was an oval indentation in the shoe mold of the vacant house directly behind petitioners' heating duct, and there was a dent in the duct which was the same size as the end of the spike microphone (R. 209, 213, 222-223). When a similar spike was inserted through the indentation in the shoe mold, it hit this dent in the duct (R. 215, 229). The spike had to be inserted into the wall seven and one-eighth inches before it came into contact with the duct (R. 215, 234-235). It was impossible to insert a spike into the party wall at any other point (R. 216, 223-224, 234). When a spike microphone comes into contact with a duct of this type, the entire heating system becomes a conductor of sound and every heating register in the house becomes a microphone (R. 228-229).

One of petitioners' expert witnesses was an electronics engineer specializing in sound acoustics. He testified that normal conversation is carried on at a level of sixty-five decibels (R. 225). The lowest decibel level which could be understood through the party wall with the naked ear is eighty-seven decibels (R. 225). A conversation carried on at seventy-five decibels could be heard through the wall as noise, but it was impossible to distinguish the words spoken (R. 230-231).

The jury convicted petitioners under the first three counts of the indictment and acquitted them under the

remaining two counts (R. 26-27). They were sentenced to imprisonment for nine months and fined $500 on counts one (D. C. Code § 22-1502) and three (D. C. Code § 22-1505), and to imprisonment for twenty months to five years on count two (D. C. Code § 22-1504), the sentences to run concurrently (R. 30-34). The trial court granted bail pending appeal.

The Court of Appeals affirmed by a divided bench. The majority distinguished *Irvine* v. *California*, 347 U.S. 128, on the ground that it involved "the revolting 'bugging' of the bedroom of man and wife" (R. 268). It went on to hold that electronic eavesdropping "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment," citing *On Lee* v. *United States*, 343 U.S. 747. In a footnote, the majority stated that *On Lee* construed the *Goldman* case as leaving open the effect of an earlier trespass in order to conceal a listening device within defendant's premises.

Judge Washington filed a dissenting opinion. He pointed out that every inference and what little direct evidence there was pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would (R. 270). The duct then became "a giant microphone" enabling the police to hear conversations on both floors of petitioners' house. In his view, it was immaterial whether the Fourth Amendment protects privacy only to the extent of banning unauthorized physical entry by the police, because, he concluded, the conduct of the police violated our fundamental concept of ordered liberty, as embodied in the due process clause of the Fifth and Fourteenth Amendments.

## SUMMARY OF ARGUMENT

The insertion of an electronic listening device into petitioners' party wall constitutes a clear violation of the Fourth Amendment. Evidence so obtained cannot be used to convict petitioners in a federal court.

In *Irvine* v. *California, supra,* this Court held that the concealment of an electronic eavesdropping device in petitioner's home constituted a flagrant violation of the fundamental principle declared by the Fourth Amendment as a restriction on the federal government. This holding cannot be emasculated by restricting it, as did the majority below, to cases where the device is concealed in the bedroom of man and wife. Nor can it be restricted to cases where the police commit a "trespass" upon the premises in order to install the device. This Court has repeatedly recognized that the Fourth Amendment is a protection of privacy. Any electronic eavesdropping device which destroys privacy is unconstitutional, regardless of where it is located or how it is installed.

Even if this Court should restrict the *Irvine* holding to "trespass" cases, petitioners' Fourth Amendment rights were violated. When the police inserted their device into petitioners' party wall and brought it into contact with petitioners' heating duct, the entire heating system was transformed into a giant microphone. This microphone picked up every word that was said anywhere in the entire house. Surely this constitutes an aggravated "trespass" sufficient to satisfy the most restrictive interpretation of the Fourth Amendment.

The conduct of the police in this case also violated the due process clause of the Fifth Amendment. In

*Wolf* v. *Colorado*, 338 U.S. 25, this Court held that the right of privacy is implicit in the concept of ordered liberty. In the *Irvine* case, Justice Frankfurter held the use of electronic listening devices is violative of due process. While state courts are free to admit into evidence the fruits of an illegal search and seizure, the federal courts are held to a stricter standard.

Apart from constitutional considerations, petitioners' convictions must be reversed in the exercise of this Court's supervisory power over the administration of justice in the lower federal courts. The admission at trial of evidence obtained by concealed electronic eavesdropping devices does not comport with the standards of decency and fairness essential to criminal trials in the federal courts. Observance of the untainted administration of justice is "one of the most cherished aspects of our institutions." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115.

The evidence used to convict petitioners was also secured in violation of the Communications Act, 47 U.S.C. § 605. Virtually all of the incriminating conversations overheard by means of the electronic listening device were telephone conversations. The law protects both sides of a telephone conversation and it prohibits the use of any devices enabling a third party to overhear either or both participants. Cf. *Rathbun* v. *United States*, 355 U.S. 107.

## ARGUMENT

### I. The Government's Evidence Was Secured in Violation of Petitioners' Rights Under the Fourth Amendment

The Fourth Amendment must be construed to secure to the people an absolute immunity from arbitrary searches and seizures, whether by physical ransacking or electronic eavesdropping. Where evidence is obtained in violation of this fundamental right it must be excluded from use in a federal court.

In this case it is undisputed that the search warrant was the fruit of petitioners' conversations overheard through the use of an electronic listening device. While the officers conducting this intrusion upon petitioners' privacy testified that on occasion they could hear conversations through the party wall with the naked ear, it has never been suggested that they heard enough with the naked ear to justify the issuance of a search warrant. Moreover, virtually all of the conversations which the officers repeated at trial in the presence of the jury were overheard by means of the spike microphone. Consequently, petitioners' convictions must be reversed unless this Court condones the surreptitious introduction of electronic listening devices into private homes and offices.

Prior decisions of this Court compel the conclusion that such police practices are unconstitutional. In *Boyd* v. *United States*, 116 U.S. 616, this Court struck down a statute requiring importers to produce their invoices or admit the government's allegation as to the contents of the invoices. In reversing a judgment of forfeiture, this Court expressly rejected the contention that a physical search and seizure is prerequisite to an unreasonable search and seizure. The opinion discussed Lord Camden's decision in *Entick* v. *Carring-*

*ton*, 19 How. St. Tr. 1030, and concluded, 116 U.S. at 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

A somewhat more restrictive interpretation of the Fourth Amendment was enunciated in *Olmstead* v. *United States*, *supra*, where this Court held that wiretapping does not violate the Fourth Amendment because the Amendment condemns only the search for and seizure of "material things."

This "materialistic" interpretation called forth strong dissents from Justices Holmes, Brandeis, Butler and Stone. Justice Brandeis called upon the Court to construe the Constitution in light of changing circumstances, stating, 277 U.S. at 473-474:

"But 'time works changes, brings into existence new conditions and purposes'. Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

"Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been but of what may be.' The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. *Ways may some day be developed by which the Government,* without removing papers from secret drawers, can reproduce them in court, and by which it *will be enabled to expose to a jury the most intimate occurrences of the home.* Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer,' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?" (Emphasis added.)

In 1940 this Court first had occasion to consider the constitutionality of electronic eavesdropping, as distinguished from wiretapping. *Goldman* v. *United States, supra,* involved a detectaphone placed against the wall of one defendant's office by federal officers. The officers actually entered the office to conceal a microphone, but when it failed to operate they relied upon the outside device. By a five-to-three decision, this Court ruled that the officers had not violated de-

fendants' rights under either § 605 of the Communications Act or the Fourth Amendment, citing *Olmstead*. The majority held that the admitted trespass was immaterial because the device installed inside of the office never functioned.

Chief Justice Stone and Justice Frankfurter dissented on the ground that *Olmstead* should be overruled. Justice Murphy wrote a separate dissenting opinion in which he stated, 316 U.S. at 139, 141:

> "There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less. Physical entry may be wholly immaterial. Whether the search of private quarters is accomplished by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view.
>
> * * * * * * *
>
> "It is strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters, thoughts perhaps too intimate to be set down even in a secret diary, or indeed, utterances about which the common law drew the cloak of privilege—the most confidential revelations between husband and wife, client and lawyer, patient

and physician, and penitent and spiritual adviser. Nor can I see any rational basis for denying to the modern means of communication the same protection that is extended by the Amendment to the sealed letter in the mails."

Three years after Justice Murphy's death, the *Goldman* case was followed by a five-to-four decision in *On Lee* v. *United States, supra.* There an undercover agent of the Bureau of Narcotics, armed with a concealed radio transmitter, entered the customers' room of petitioner's laundry and engaged him in an incriminating conversation. Another agent stationed outside of the premises picked up the entire conversation with a receiving set and related what he had heard at the trial. On the authority of *Goldman* a majority held that petitioner's rights under the Fourth Amendment had not been violated. The majority found it unnecessary to discuss the constitutional consequences of a trespass, since it concluded that the facts did not disclose a trespass.

Implicit in the dissenting opinions is a deep-seated distaste for police methods which indiscriminately intrude upon private affairs. Justice Burton, joined by Justice Frankfurter, urged that the Fourth Amendment must be construed to proscribe the unlawful seizure of intangibles, such as spoken words. Justice Black urged that the evidence should be excluded in the exercise of this Court's supervisory authority over the lower federal courts. Both Justice Frankfurter and Justice Douglas concluded that *Olmstead* and *Goldman* should be overruled.

The conversation overheard in *On Lee* occurred in a quasi-public place and was broadcast with the consent

and cooperation of one participant.[2] The Solicitor General conceded that a different result might be compelled if science should develop a way of intercepting "truly private conversations." At page 28 of his brief on the merits, the Solicitor General referred to the dissenting opinion of Judge Frank in the Court of Appeals and stated:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publicize conversations within a private home are unrelated to the instant case. As has been observed above, a private home is not here involved; the conversation transpired in a place to which the public was invited. In any event, if science should in the future perfect instruments which seriously invade truly private conversations, the validity of such developments may be considered as they appear."

"Truly private conversations" became the subject of this Court's consideration in *Irvine* v. *California; supra.* There, state officers made a key to petitioner's house, entered in his absence, and installed a concealed microphone in the hall. On a second occasion the officers moved the microphone to a bedroom occupied by petitioner and his wife, where it remained for more than a month. When petitioner was tried for violation of state gambling statutes, the officers testified as to conversations overheard by means of the microphone.

At issue in *Irvine* was not whether petitioner's Fourth Amendment rights had been violated, but only

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[2] Cf. *Rathbun* v. *United States*, 355 U.S. 107, holding it was not a violation of § 605 of the Communications Act for an officer to listen on an extension phone with the consent of one party to the conversation.

whether his conviction had been obtained in violation of the due process clause of the Fourteenth Amendment. In resolving this question, eight members of this Court concluded that the officers' conduct constituted an unreasonable search and seizure. The majority, however, concluded that petitioner's conviction should be affirmed on the authority of *Wolf* v. *Colorado, supra.*

The decision of the court below in this case is squarely contrary to the views expressed in *Irvine.* Justice Jackson, with the concurrence of the Chief Justice and Justices Reed and Minton, stated, 347 U.S. at 132:

> "Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government: . . ."

Justice Clark concurred in this result "with great reluctance" and only because a majority of the Court were unwilling to overrule *Wolf,* thus indicating his belief that the officers were guilty of an unreasonable search and seizure. Justices Frankfurter and Burton dissented on the authority of *Rochin* v. *California,* 342 U.S. 165, stating, 347 U.S. at 145-146:

> "Certainly the conduct of the police here went far beyond a bare search and seizure. The police de-

> vised means to hear every word that was said in the Irvine household for more than a month. . . . Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that '[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.' Brandeis, J., dissenting in *Olmstead* v. *United States*, . . ."

Justice Douglas dissented on the ground that *Wolf* should be overruled. He stated, 347 U.S. at 149:

> "The search and seizure conducted in this case smack of the police state, not the free America the Bill of Rights envisaged."

The opinions in the *Irvine* case have profound significance here for two reasons. In the first place, they unmistakably extend the protection of the Fourth Amendment to the spoken word. They lay to rest forever the "materialistic" interpretation suggested by *Olmstead* and *Goldman*. They destroy the "strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper but allows the revelation of thoughts uttered within the sanctity of private quarters." *Goldman* v. *United States*, 316 U.S. 129, 141, dissenting opinion of Justice Murphy.

In the second place, the *Irvine* opinions demonstrate a profound judicial concern with the protection of privacy. Concededly the police conduct in *Irvine* consti-

tuted a trespass. Concededly also it was not the trespass which called forth the condemnation of this Court. The fact which so disturbed this Court was that the police had overheard every word spoken by Irvine and his wife in their bedroom for over a month. This was the police conduct which "so flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment." The fact that the police had entered Irvine's home on several occasions in his absence to accomplish their objectives was of secondary significance.

If the police had been able to overhear Irvine's conversations by means of a microphone inserted into his bedroom wall from the exterior of the premises or even by means of a microphone attached to the outside of his bedroom window, it would have been an equally flagrant, deliberate, and persistent violation of his privacy and hence of the fundamental principle declared by the Fourth Amendment. The protection of great constitutional principles cannot depend upon acoustical problems.

As was so forcefully recognized many years ago in the *Boyd* case, breaking into a house and rummaging through drawers are only "circumstances of aggravation." It can make no difference to the victim whether the police are listening to his conversations with a device concealed inside or outside of his premises. Indeed, a device concealed outside of the premises is more frightening because even the most painstaking search will not uncover it.

The absurdity of hinging constitutional rights upon the purely adventitious factor of location is underscored by scientific progress in this field. Inside de-

vices may soon become completely obsolete. Recent congressional hearings[3] have elicited testimony about a device known as the parabolic microphone which can pick up a conversation three hundred yards away. There was also testimony concerning a still experimental technique whereby a room is flooded with a certain type of sonic wave. When perfected this technique will make it possible to overhear everything said in a room without ever entering it or even going near it.

These techniques are discussed at some length in a widely heralded study published under the auspices of the Pennsylvania Bar Association Endowment.[4] This study describes contact microphones similar to the spike microphone used here and suggests that they have wide utility. It goes on to describe parabolic microphones which can pick up a conversation through an open office window on the opposite side of a busy street. It further concludes that a radio microphone could be constructed to pick up conversations in a distant room. This device would be similar to the technique discussed at earlier congressional hearings. The bar study concludes:[5]

> "If devices of the type described are admitted as a possibility, defense against eavesdropping becomes a very specialized task, one which is no

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[3] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2nd Sess., on Wiretapping, Eavesdropping, and the Bill of Rights; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., on Wiretapping.

[4] Dash, Knowlton & Schwartz, *The Eavesdroppers*, (Rutgers University Press, 1959), pp. 341, 346-358.

[5] Id. at 358.

> longer in the realm of the private investigator, but rather in that of the physicist or engineer. To foil an ultrasonic beam is not too difficult, since it has difficulty in passing through solid or porous substances. With a microwave beam the situation is quite different. . . . To be certain of defense against any eavesdropping of this kind (and incidentally, against wireless microphones as well), one should shield his room completely with continuous covering of aluminum foil and substitute for his window glass a special conducting glass made by several of the large glass companies . . . ."

This case forcefully illustrates the absurdity of making constitutional rights contingent upon preservation of the scientific status quo. The government urged in the courts below that there was no violation of petitioners' constitutional rights because the spike microphone did not penetrate into petitioners' half of the party wall and no officer entered petitioners' premises. Since the party wall was thirteen to fourteen inches in thickness, government counsel argued that there could be no "trespass" unless the spike was inserted into the wall at least six and one-half inches. The government contended that it had actually been inserted only five and seven eighths inches or less, although the evidence was uncontroverted that the spike had to penetrate more than half of the wall in order to make contact with the heating duct.

According to the government's theory, petitioners' constitutional rights were preserved by five-eighths of an inch. Excerpts from the government's brief in the Court of Appeals which set forth this arithmetical argument are included as an appendix to this brief.

If justice is to be thus meted out by the inch—or, in this case, by eighths of an inch—the Fourth Amend-

ment becomes a mockery. It is precisely for this reason that petitioners have consistently denied any necessity for a trespass as a condition precedent to unconstitutionality.

The Court of Appeals agreed that such important constitutional rights cannot be measured in fractions of an inch. The majority failed to recognize, however, that if a "trespass" is not a condition precedent to unconstitutionality, then petitioners' Fourth Amendment rights were seriously invaded.

Only last term this Court refused to condition the protection of the Fourth Amendment upon technical concepts of tort law. *Jones* v. *United States*, 362 U.S. 257. In language equally applicable to this case, Justice Frankfurter concluded "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." 362 U.S. at 266.

It is interesting to note that the executive branch of the government is not unanimous in condoning all eavesdropping accomplished without a "trespass." The American Ambassador to the United Nations recently protested to the Security Council concerning a wireless microphone and transmitter employed by the Soviet Union.[8] This device was concealed in a carved replica of the seal of the United States presented to the Ambassador in Moscow. The Ambassador

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[8] *New York Times*, May 27, 1960, p. 1, cols. 5, 8; p. 3, col. 1; p. 30, col. 1.

placed it above his desk, where it reportedly enabled Russian agents outside of the Embassy to overhear conversations within the Ambassador's office for seven years.

No Russian agent entered the American Embassy for the purpose of installing this device, and hence there was no "trespass." The Department of State, however, did not regard the absence of a "trespass" as legitimatizing the Russians' conduct.

Petitioners have taken the position that *Goldman* was impliedly overruled by the *Irvine* opinions and that it should now be expressly overruled. If this Court should be unwilling to overrule *Goldman* at the present time, however, petitioners' convictions must still be reversed. Even if we should accept the continuing validity of the *Goldman* result, this case is clearly distinguishable on two grounds. In *Goldman* the listening device was affixed to one side of a partition wall in an office building. In this case the device was actually inserted into a party wall, and petitioners' entire heating system was, in Judge Washington's words, transformed into "a giant microphone" (R. 270).

In the District of Columbia, adjacent landowners hold title to a party wall as tenants in common.[7] The owner of the premises in question had an undivided interest in the entire party wall which passed to petitioners when they leased the premises. When the police inserted an electronic device into this wall without petitioners' knowledge or consent, they were violating petitioners' property rights. It becomes immaterial whether the spike penetrated more than half

[7] *Fowler* v. *Koehler*, 43 App. D.C. 349; *Moore* v. *Shoemaker*, 10 App. D.C. 6.

of the wall, because any substantial penetration violated petitioners' rights.

The owner of the adjacent premises could not authorize the police to insert a listening device into the party wall because he had no authority to do so himself. It is settled that equity will compel a landowner to close up windows in a party wall.[8] The same result should certainly be reached if a landowner affixes listening devices in a party wall. Neither visual nor auditory surveillance is consonant with the purposes for which party walls are permitted.[9] Regardless of whether the adjacent landowner *could* have consented to insertion of the device, there is no evidence that he *did* consent. Permission to use the premises for "observation" cannot be construed to authorize what was done in this case.

The second distinguishing factor between *Goldman* and this case was stressed below by Judge Washington. This was not an ordinary case of eavesdropping from outside of the victim's premises. Here the record compels the conclusion that the spike microphone was in continuous contact with petitioners' heating duct. Every heating register in the house became in effect a microphone. It was only by converting petitioners' heating system into a giant microphone that the police were able to overhear every word spoken in every part of the house.

This technique is analogous to converting a defendant's telephone into a microphone which picks up every

[8] *Bartley* v. *Spaulding*, 21 D.C. 47; *Corcoran* v. *Nailor*, 6 Mackey (17 D.C.) 580.

[9] See Note, 27 Geo. Wash. L. Rev. 735.

word said in the room even when the receiver is on the hook.[10] At present it is necessary to enter the premises in order to convert a telephone into a microphone. Concededly the Fourth Amendment bars evidence secured in this way. But it may one day be possible to convert a telephone into a microphone by changes made in the wiring outside of the victim's premises. Surely the Fourth Amendment must also bar evidence secured in this way, regardless of whether this Court is now prepared to rule that it bars evidence secured by any kind of electronic listening device unless one party to the conversation consents.

Even if the right of privacy conferred by the Fourth Amendment is not unlimited, it must surely protect the individual against police eavesdropping which converts his heating system or his telephone system into a network of microphones. Neither *Goldman* nor any other decision of this Court confers this kind of authority upon federal officers.

**II. The Government's Evidence Was Obtained in Violation of Petitioners' Rights Under the Fifth Amendment**

Judge Washington, dissenting in the court below expressed the view that the conduct of the police officers in this case was violative of our fundamental concept of ordered liberty as embodied in the due process clause of the Fifth and Fourteenth Amendments, citing *Irvine* v. *California*, *supra*, and *Palko* v. *Connecticut*, 302 U.S. 319. Under this view it becomes immaterial whether the Fourth Amendment is restricted to cases where there is an actual trespass.

[10] Dash, Knowlton & Schwartz, *op. cit.* at 339-340.

This Court has on previous occasions recognized that the right of privacy protected by the Fourth Amendment is implicit in "the concept of ordered liberty" and as such enforceable against the states through the due process clause of the Fourteenth Amendment. *Wolf* v. *Colorado*, 338 U.S. 25, 27-28. Due process is not, however, so limited in its application as to relate only to seizures in violation of the Fourth Amendment. It must of necessity encompass practices which offend our traditional sense of justice. *Rochin* v. *California*, 342 U.S. 165.

Justice Frankfurter, dissenting in *Irvine*, commented on the conduct of the police officers as follows, 347 U.S. at 145-146:

> "Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. . . . Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. . . ."

Similarly in this case the conduct of the police went beyond a bare search and seizure. Moreover, the existence or nonexistence of a trespass is not crucial to a determination of whether the conduct in question violated due process, for the ultimate evil to be guarded against is invasion of privacy without authority of law. Thus where particular conduct of police officers may not be violative of the Fourth Amendment because of the absence of a trespass, it may still be pro-

scribed by the due process clause of the Fifth Amendment.

Surely our sense of justice and our concept of ordered liberty require that police take action against citizens only pursuant to duly conferred authority as suggested by Judge Washington in the court below, and by Justice Frankfurter in *Irvine*. The conduct of the police officers in this case puts a premium upon force and fraud to achieve expeditious law enforcement.[11] To tolerate such practices as are revealed here is but to invite further refinements in the effective and unrestricted use of electronic surveillance devices. Law enforcement must be tempered with fairness and objectivity; to tolerate employment of electronic eavesdropping devices, whether inside the home or out, does not conform with such requirements.

Eavesdropping, such as occurred in this case, raises graver and more serious problems than presented by wiretapping. This is especially so because of the fact that the eavesdropper today is not only unseen but virtually undetectable. The public is to some extent on guard against wiretapping, but there is no way to be on guard against electronic eavesdropping. The grim fact is that no conversation can be really immune to advanced electronic eavesdropping devices.

Issuance of a search warrant has long excluded authority to conduct a general search for evidence. See e.g., *Harris* v. *United States*, 331 U.S. 145, 154; *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466; *Gouled* v. *United States* 255 U.S. 298, 309. Eavesdropping, on the other hand, constitutes nothing less than such a

[11] See *On Lee* v. *United States*, 343 U.S. 747, 760-761, dissenting opinion of Justice Frankfurter.

search for evidence. Unlike wiretapping, which might under certain circumstances be defended as a search for the instruments of crime, eavesdropping is tantamount to the ancient writ of assistance. Every single conversation in office or home may be made the subject of public information in police efforts to trap the criminal. The modern luxury of the glass house becomes a liability. For adequate protection one must search for the deepest cave to elude his overseers and attain the privacy so long cherished in our society.

The facts in the instant case demonstrate the potential danger of such instruments. Every part of the premises which petitioners occupied was subject to continuous surveillance, limited only by the physical capacities of the officers. That personal conversations of husband and wife, confessor and penitent, or attorney and client might have been the subject of such surveillance need hardly be mentioned.

Traditionally, action against private citizens which is potentially oppressive has been controlled by the judiciary. Thus warrants are issued only on probable cause. In the field of electronic eavesdropping, however, there is no such insulation from oppression. Answering to no one or no thing, the police officers are restricted by their consciences only. Due process does not contemplate such unbounded authority in the hands of the police. The exclusionary rule of *Weeks* v. *United States*, 232 U.S. 383, must apply under these circumstances.

**III. In the Exercise of this Court's Supervisory Power over the Administration of Justice in the Lower Federal Courts the Government's Evidence Against Petitioners Should Be Ruled Inadmissible**

Unquestionably this Court, in exercise of its supervisory powers over the federal courts, has authority to formulate rules of evidence. *Mesarosh* v. *United States*, 352 U.S. 1; *Holland* v. *United States*, 348 U.S. 121, 135 n. 7; *Communist Party* v. *Subversive Activities Control Board*, *supra*; *McNabb* v. *United States*, 318 U.S. 332, 340; and see *On Lee* v. *United States*, *supra*, dissenting opinion of Justice Black.

In *McNabb*, this Court found inadmissible incriminating statements made by the petitioners during a period of unlawful detention. The statements in question were excluded not upon constitutional grounds, but upon standards of procedure and evidence formulated by this Court. As stated by Justice Frankfurter in writing for the majority, 318 U.S. at 340-341:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. . . .
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> "The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. . . . And in formulating such rules of evidence for Federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

On this basis it was not necessary in *McNabb* to reach the constitutional question raised by the petitioners. So, too, in this case, aside from the constitutional issues raised, the evidence adduced against petitioners should be excluded to insure the untainted administration of justice.

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124. Use of evidence obtained through the surreptitious use of electronic eavesdropping devices does not comport with this standard. While the conduct of the police in the instant case may not have been in violation of any statute or express rule of law, neither was it conduct adhering to any duly-conferred authority. Certainly such electronic eavesdropping was never contemplated in "common law concepts of legitimate police activity." *Silverman* v. *United States*, dissenting opinion of Judge Washington (R. 271).

Moreover, the power of this Court to formulate rules of evidence in the exercise of its supervisory power over the administration of justice is not dependent upon the existence of a federal statute as suggested by the Solicitor General in his brief in opposition to the petition for certiorari. Considerations wholly apart from the Constitution, federal statutes or the principles of relevance may necessitate the adoption of particular rules. Cf. *McNabb* v. *United States, supra; Communist Party* v. *Subversive Activities Control Board, supra.*

Consideration of the dangers and potential abuses inherent in the indiscriminate use of devices such as

the spike microphone compels the conclusion that the dignity of the federal courts should not be sacrificed to law enforcement methods so derisive of individual liberty and security. "The dignity of the United States Government will not permit the conviction of any person on tainted evidence." *Mesarosh* v. *United States*, 352 U.S. 1, 9. In light of these considerations all evidence obtained by electronic eavesdropping should be excluded in the federal courts.

**IV. Evidence of Petitioners' Telephone Conversations Obtained Through Use of an Electronic Listening Device, Not Connected to the Telephone Apparatus, Was Obtained in Violation of § 605 of the Communications Act**

In *Rathbun* v. *United States*, 355 U.S. 107, this Court held that listening on an extension telephone with the consent of one party to a conversation does not violate § 605 of the Communications Act, 47 U.S.C. § 605. From the dissenting opinion of Justice Frankfurter it is apparent that a contrary result would obtain if neither party to the conversation consented to the use of the extension telephone. Petitioners submit that, at the very least, the law prohibits the use of a mechanical or electronic device to overhear any part of a telephone conversation unless one party consents. Physical interception of the entire conversation is not the touchstone to illegality. To hold otherwise would permit simultaneous eavesdropping at each end of a telephone conversation with impunity. Such circumvention of § 605 would render its interdictions meaningless.

In *Rathbun* the officers intercepting petitioner's telephone conversation did so at the direction of the second party to the conversation. Chief Justice Warren, writing for the majority, compared this use

of a telephone extension to the holding out of the handset so another person could hear what was being transmitted. 355 U.S. at 110-111. A different result would obtain if the officers had surreptitiously used the extension telephone, or had they used a microphone sufficiently powerful to pick up Rathbun's conversation at a substantial distance from the receiver without the consent of the other party to the conversation. Cf. *United States* v. *Hill*, 149 F. Supp. 83.

Surely the fact that the police officers in this case used an electronic device at the sending end rather than the receiving end of the conversation does not render their conduct without the purview of § 605. Section 605 must be construed to protect each party to a telephone conversation from devices designed to intercept his part of the conversation. *Irvine* v. *California*, *supra*, and *Goldman* v. *United States*, *supra*, notwithstanding, there is no logical reason to support a construction of § 605 which affords protection to the entire conversation but does not protect each separate end of it. Such a distinction is one of form and not of substance.

Noteworthy in both the *Irvine* case and the *Goldman* case is the apparent fact that those portions of the respective petitioners' telephone conversations introduced in evidence did not constitute a vital part of the prosecution's proof against them. The telephone conversations were overheard incidental to the overhearing of entire face to face conversations. Such is not the situation in the case at bar, for here virtually the entire basis for the prosecution rests upon petitioners' telephone conversations. Moreover, the suggestion in *Goldman* that a conversation is protected only while in transit and not at the moment it leaves the sender

is unrealistic in view of the fact that transmission of sound by electrical impulse travels at the speed of light, or 186,000 miles per second.[12]

This issue should be considered in light of the observation of Mr. Justice Frankfurter in *Nardone* v. *United States*, 308 U.S. 338, 340, commenting on the first *Nardone* case, 302 U.S. 379:

> "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.'"

Petitioners likewise do not urge a "meticulous reading of technical language." They urge a construction of § 605 which is essential to the sensible application of the Communications Act.

## CONCLUSION

For the foregoing reasons, petitioners urge that the judgments of the court below should be reversed and the case remanded to the District Court with directions to enter judgments of acquittal as to the petitioners.

Respectfully submitted,

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August, 1960

[12] See *United States* v. *Hill*, 149 F. Supp. 83, 85, n. 5.

## APPENDIX

Extract from Appellee's brief (pp. 18-20) in the United States Court of Appeals for the District of Columbia Circuit, *Silverman* v. *United States*, 275 F. 2d 173:

"The only difference between the present case and the *Goldman* case is that here a spike was inserted into a party wall no more than halfway to aid the officers in hearing the conversations of the appellants. In the present case there was no physical intrusion into the room of the appellants. The device used was only a refinement of the detectiaphone used in *Goldman*. The officers had good reason to believe that the appellants were engaged in illegal activities. The listening device was installed only after the officers had gained the consent of the owner and had legally entered 410 21st Street, N. W.

"Mere use of the mechanical aids to the human senses, e.g., a field glass or a searchlight without any physical intrusion on to premises has never been regarded as converting observation into search. *United States* v. *Lee*, 274 U.S. 559 (1927); *Smith* v. *United States*, 2 F. 2d 715 (1924). The mere fact that evidence has been obtained by eavesdropping standing alone has never been a ground for excluding the evidence.

"Appellants maintain that the officer's committed a trespass by inserting the spike into the party wall and that, therefore, the present case can be distinguished from *Goldman*. To the contrary, the record in this case clearly shows that there was no trespass. The evidence revealed that the spike was *eleven and three eighths inches in length* (J.A. 102) and that it actually went into the wall *less than halfway* (J.A. 61, 103, 104, 122, 157, 158, 255). The wall including the baseboard and moulding was *thirteen to fourteen inches in width* (J.A. 123, 214, 215). In order for the spike to have passed the midline of the party wall it would have had to have been inserted *at least over six and one-half inches* beyond the leading edge of the moulding in 410. The uncontradicted testimony of the Government witnesses established as fact that the spike did not penetrate the wall beyond the halfway mark.

"There was no trespass in law. The weight of authority and the law in the District of Columbia is that the owners of adjoining premises are not tenants in common of a party wall erected partly on the lands of each but that each owns in severalty the part which rests upon his side of the line with an easement of support from the other part. *Fowler* v. *Koehler*, 43 App. D.C. 349 (1915).

"In *Fowler* v. *Koehler, supra,* the Court stated, p. 356, 7:

> 'It is therefore a condition annexed to the title of every house lot in the City of Washington and when the proprietor builds a partition wall between himself and his neighbor he shall lay the foundation equally upon the lands of both; and that any person who shall afterwards use the partition wall or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use.'
>
> * * * * * * *
>
> "* * * The erection of a party wall does not change the boundaries nor affect the title of the respective properties. While it stands each party is permitted to use the wall. The right to its use and enjoyment passes with a conveyance of the properties and when for any reason, it ceases to exist, the rights of the respective owners stand as originally. (Emphasis supplied [*sic*].)

It is obvious, therefore, that the owner of 410 owned the party wall to the midline and that the only right that the other party had in his wall was a right of lateral support." (Emphasis added.)